U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue date: 08Apr2002

CASE NO: 2002 - INA - 36

In the Matter of:

NEWPORT TRIM CONSTRUCTION,
Employer

On Behalf of:

NATANAEL PERALTA,
Alien

Appearances: Leonard W. Stitz, Esq.
For Employer and Alien

Certifying Officer: Martin Rios

Before: Holmes, Vittone and Wood

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Natanael Peralta ("Alien") filed by Newport Trim Construction ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A), and the regulations promulgated thereunder, 20 C.F.R. Part 756. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco denied the application and the Employer and Alien requested review pursuant to 20 C.F.R. 656.26. This Board remanded the case to the CO for further explanation of the prevailing wage determination. *See* 2000 INA 215 (Dec. 18, 2000).

Under Section 212(a)(5)(A) of the Immigration and Nationality Act, an alien seeking to enter the United States for the purpose of performing labor may receive a visa if the Secretary of Labor has determined and certified that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States citizens similarly employed. Employers desiring to employ an alien on a permanent basis must

demonstrate that the requirements set forth at 20 C.F.R. Part 656 are met.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and the Employer's appellate brief.

STATEMENT OF THE CASE

On August 28, 1998, the Employer, a "general/trim construction" company, filed an amended application for labor certification for a "framer (construction)". (AF-44.) An eighth grade education and two years experience in the job were required. The Employer sought a wage of $14.50 per hour.

On December 29, 1999, the CO issued a Notice of Findings proposing to deny certification. (AF-39-42.) The CO stated that the occupation of carpenter "is one for which a prevailing wage determination has been made under the Davis-Bacon and/or Service Contract Act (SCA)." Corrective action was required to meet the scheduled prevailing wage of $23.80 per hour.

On January 20, 2000, the Employer responded that the Davis-Bacon Act was inapplicable, positing that the Davis-Bacon Act was meant to deal exclusively with government contracts. The Employer further argued that notwithstanding the issue of the applicability of the Davis-Bacon Act schedule, "a recent review of the [California] Employment Development Department's ("EDD") Labor Market Information Division indicates that the median wage for a carpenter with less than two years experience is $10.00. The employer's offered wage tremendously exceeds the median wage." (AF-10-13.)

On February 3, 2000, the Regional Administrator issued a Final Determination denying the Employer's application for certification. (AF-25-27.) The Final Determination reiterated the conclusions raised in the Notice of Findings that the Davis-Bacon Act schedule applied and that the prevailing wage was $23.80. The Employer requested a review of the Final Determination on February 8, 2000. (AF-1-6.)

On December 18, 2000, this Board rejected the Employer's argument that the Davis-Bacon Act did not apply, but vacated the determination of $23.80 as the prevailing wage because the Board did not have adequate information regarding whether the Final Determination was reasonable. Consideration was given to the Employer's contention that the prevailing wage for the category of "experienced" carpenters was $10.00 compared to the prevailing wage for the category of union carpenters with three years at the firm of $23.80.[1] The matter was remanded to the CO to provide a

[1]These findings were based on the 1995 EDD California Occupational Guide Wage Supplement.

reasonable explanation of how the prevailing wage rate was determined and why it was appropriate.

On February 23, 2001, the CO contacted the California EDD and requested that it review, research, and provide documentation for an appropriate wage determination. (AF-47-48.) The EDD responded by providing a more recent Davis-Bacon Act schedule for framers and finish carpenters for 1999. This schedule listed the prevailing wage as $18.79 per hour for all carpenters (i.e. without consideration of union status or experience). (AF-50.)

On April 17, 2001, the CO issued another Notice of Findings in response to the matter on remand. (AF-36-37.) The CO revised the required prevailing wage to $18.79 per hour. The CO's finding was based upon the "local Employment Service office, to the extent of its expertise, and to the extent feasible, using wage information available to it . . ."

On June 18, 2001, the Employer again filed a rebuttal to the Notice of Findings. (AF-28-30.) The Employer continued to argue that the Davis-Bacon Act schedule did not apply and that the proper wage should be the 1995 wage of $10.00 per hour.

On July 27, 2001, the CO issued another Final Determination denying certification. (AF-19-20.) The CO considered the Employer's rebuttal, but relied upon the California EDD prevailing wage determination for carpenters of $18.79 per hour.

The Employer contends again that the Davis-Bacon Act is inapplicable and that the prevailing wage determination of $18.79 is inaccurate, citing the 1995 EDD Occupational Guide Wage Supplement of $10.00.[2]

DISCUSSION

The Employer's argument regarding the inapplicability of the Davis-Bacon Act in determining the prevailing wage is misplaced. This Board has already rejected this argument in this case, applying the holding in El Rio Grande, 1998-INA-133 (Feb. 4, 2000).

Regarding the prevailing wage determination, the burden of persuasion initially "rests with the Employer seeking to challenge the CO's prevailing wage determination . . . [presuming] 'that the Employer knows the source and basis for the CO's determination.'" El Rio Grande, 1998-INA-133, *citing* John Lehne & Sons, 1982-INA-267 (May 1, 1992)(*en banc*). The CO "must provide a reasonable explanation of how the prevailing wage was determined from the schedule, and why it is appropriate under the circumstances." De La Garza Construction Co., 2000-INA-40 (Feb. 23, 2001.)

---

[2]The issue of whether the Employer should be allowed to re-advertise the position at the newly determined prevailing wage was not raised.

On remand, the CO contacted the California EDD and requested review, research, and documentation of what prevailing wage was appropriate. I find that this was a reasonable attempt by the CO to determine the prevailing wage. Although the CO did not explain in detail if this figure was determined according to factors such as experience and union status, which were factors in the initial prevailing wage determination, the Employer failed to offer any further argument in rebutting the CO's determination. Under the narrow facts of this case, therefore, the CO's denial of certification must be affirmed.

ORDER

The Certifying Officer's Denial of Certification is Affirmed.

For The Panel:

A
JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.